

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE:)
)
ITT EDUCATIONAL SERVICES, INC., *et al.*¹) Case No. 16-07207-JMC-7A
)
Debtors.) Jointly Administered

**TRUSTEE’S MOTION TO COMPROMISE AND
SETTLE ALL CLAIMS AGAINST DELOITTE & TOUCHE LLP**

Deborah J. Caruso, the chapter 7 trustee in this case (the “Trustee”), by counsel, pursuant to 11 U.S.C. §§ 105 and 363 and Rule 9019 of the Federal Rules of Bankruptcy Procedure, requests entry of an order authorizing the Trustee to compromise and settle all claims and causes of action against Deloitte & Touche LLP (“D&T”) on the following grounds:

I. JURISDICTION

1. The Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).
2. Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.
3. The statutory predicate for relief are sections 105 and 363 of Title 11 of the United States Code (the “Bankruptcy Code”) and Rule 9019 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

II. BACKGROUND

4. On September 16, 2016 (the “Petition Date”), ITT Educational Services, Inc. (“ITT”), ESI Service Corp. (“ESI”) and Daniel Webster College, Inc. (“Webster College,” and together with ITT and ESI, the “Affiliated Debtors”) each filed a voluntary petition under chapter

¹ The debtors in these cases, along with the last four digits of their respective federal tax identification numbers are ITT Educational Services, Inc. [1311]; ESI Service Corp. [2117]; and Daniel Webster College, Inc. [5980].

7 of the Bankruptcy Code. The Trustee was appointed interim trustee under section 701 of the Bankruptcy Code in each of the Affiliated Debtors' bankruptcy cases on the Petition Date, and in accordance with section 702(d) of the Bankruptcy Code, became the permanent case trustee on November 1, 2016 following the conclusion of the meeting of creditors held pursuant to section 341(a) of the Bankruptcy Code.

5. On October 4, 2016, the Court entered its *Order Granting Motion for Joint Administration of Chapter 7 Cases* [Docs 221 & 222], directing the Affiliated Debtors' bankruptcy cases to be jointly administered for procedural purposes only.

6. On September 10, 2018, the Trustee filed a *Complaint to Avoid and Recover Transfers Pursuant to 11 U.S.C. §§ 547, 548 and 550, to Disallow Claims Pursuant to 11 U.S.C. § 502 and for Unjust Enrichment* (the "Complaint") against D&T, Adversary Proceeding No. 18-50276 (the "Adversary Proceeding"). In the Complaint, the Trustee seeks, in part, to avoid and recover, pursuant to chapter 5 of the Bankruptcy Code, transfers received by D&T from the Affiliated Debtors in the amount of \$485,000.00 (the "Avoidance Claim"). The Trustee also asserts that she has claims against D&T arising from prepetition services D&T provided to ITT as its auditor between 2014 and 2016, which collectively with the Avoidance Claim shall be referred to as the "D&T Claims."

7. D&T denies all allegations of wrongdoing, violations of law, or any other basis for liability arising out of the D&T Claims.

III. SETTLEMENT

8. In an effort to resolve the D&T Claims, the Trustee and D&T participated in various arms-length negotiations. As a result, the Trustee and D&T have reached a settlement, subject to Court approval, resolving all claims and causes of action against D&T relating to the

Affiliated Debtors. Attached and incorporated as Exhibit 1 is the partially redacted copy of the *Settlement Agreement and Mutual Release* (the “Settlement Agreement”) reflecting the agreement reached by the Trustee and D&T, in which only the Settlement Amount² has been redacted.

9. The following summary of salient terms of the Settlement Agreement is intended to provide the basic framework of the settlement terms to the Court and other parties in interest in the case and does not provide the complete terms of the cited provisions or the Settlement Agreement more generally. Nothing in the summary provided below should be construed as supplanting or supplementing the detailed terms set forth in the Settlement Agreement. To the extent there is any conflict between the specific terms of the Settlement Agreement and the below summary, the specific terms of the Settlement Agreement shall control.

10. As summarized, the Settlement Agreement provides that:

- (a) **Payment by D&T:** Within ten (10) business days of the Settlement Effective Date, D&T shall send the Settlement Amount by electronic funds transfer to the Affiliated Debtors’ bankruptcy estates’ account as directed by the Trustee.
- (b) **Dismissal of the Adversary Proceeding:** Within two (2) business days of receiving the Settlement Amount, the Trustee shall file a joint stipulation of dismissal with prejudice in the Adversary Proceeding, dismissing all claims against D&T in the Adversary Proceeding with prejudice.
- (c) **Release by Estate Releasors:** Effective upon (a) the Settlement Effective Date and (b) receipt of the Settlement Amount, the Estate Releasors hereby release and forever discharge the Deloitte Releasees, and each of them individually, to the fullest extent that the law permits their release, of and from any and all claims, suits, actions, causes of action, damages (without limitation, compensatory, punitive, exemplary, rescissory, direct, consequential or special damages, and restitution and disgorgement), demands, rights, debts, penalties, costs, expenses, fees, injunctive relief, attorneys’ fees, expert or consulting fees, prejudgment interest, indemnities, duties, liabilities, losses, or obligations of every nature and description whatsoever, known or unknown, whether or not concealed or hidden, fixed or contingent, direct or indirect, anticipated or unanticipated, asserted or that

² Capitalized terms used but not otherwise defined herein shall have the meanings used in the Settlement Agreement.

could have been asserted by or on behalf of the Estate Releasors, whether legal, contractual, rescissory, statutory, or equitable in nature, whether arising under federal, state, common or foreign law, that now exist or have ever existed from the beginning of time until the date of this Agreement that are based upon, arise from, or are related to the Affiliated Debtors or to any services D&T provided to Affiliated Debtors.

- (d) **Release by Deloitte Releasors:** Effective upon (a) the Settlement Effective Date and (b) the filing by the Trustee of a joint stipulation with prejudice, the Deloitte Releasors hereby release and forever discharge the Estate Releasees, and each of them individually, to the fullest extent that the law permits their release, of and from any and all claims, suits, actions, causes of action, damages (without limitation, compensatory, punitive, exemplary, rescissory, direct, consequential or special damages, and restitution and disgorgement), demands, rights, debts, penalties, costs, expenses, fees, injunctive relief, attorneys' fees, expert or consulting fees, prejudgment interest, indemnities, duties, liabilities, losses, or obligations of every nature and description whatsoever, known or unknown, whether or not concealed or hidden, fixed or contingent, direct or indirect, anticipated or unanticipated, asserted or that could have been asserted by or on behalf of the Deloitte Releasors, whether legal, contractual, rescissory, statutory, or equitable in nature, whether arising under federal, state, common or foreign law, that now exist or have ever existed from the beginning of time until the date of this Agreement that are based upon, arise from, or are related to the Affiliated Debtors or to any services D&T provided to the Affiliated Debtors.
- (e) **Confidentiality of Settlement Amount:** The Settlement Amount shall be treated as confidential and shall not be offered into evidence in any action, arbitration, or proceeding for any purpose whatsoever except to obtain approval of the Settlement Agreement or as necessary to enforce the Settlement Agreement, or disclosed, described, or characterized to any other person, entity, publication or member of the media for any purpose, *provided however*, that the parties may disclose the fact that a settlement has been entered into on mutually agreeable terms. Further, the Settlement Amount may be disclosed to certain parties under certain conditions as further described in paragraph 13 of the Settlement Agreement.

11. Due to the confidentiality provision requiring the Settlement Amount to be treated as confidential, the Trustee has attached a partially redacted copy of the Settlement Agreement. The Trustee is contemporaneously filing herewith a motion requesting that the unredacted Settlement Agreement be filed under seal indefinitely with it not being made available to any third party without the consent of both the Trustee and D&T; provided however, the unredacted

Settlement Agreement may be provided to the Court, the United States Trustee's Office and any auditor serving under 28 U.S.C. § 586(f), on a confidential basis, unless otherwise ordered by the Court.

IV. RELIEF REQUESTED

12. The Trustee requests entry of an order, pursuant to sections 105 and 363 of the Bankruptcy Code and Bankruptcy Rule 9019: (a) authorizing the Trustee, pursuant to the terms of the Settlement Agreement, to compromise and settle all claims and causes of action related to D&T, including but not limited to, those claims and causes of action related to the D&T Claims; (b) approving the Settlement Agreement; and (c) authorizing the Trustee to retain the Settlement Amount for general administration by the Affiliated Debtors' bankruptcy estates.

V. GROUNDS FOR GRANTING RELIEF

13. A court may authorize a trustee to enter into a settlement so long as it is a sound exercise of the trustee's business judgment. *See* 11 U.S.C. § 363(b); *In re UAL Corp.*, 443 F.3d 565, 571 (7th Cir. 2006) (use of estate assets under section 363 of the Bankruptcy Code must "[make] good business sense"); *In re Schipper*, 933 F.2d 513, 515 (7th Cir. 1991) (section 363 involves exercise of fiduciary duties and requires an "articulated business justification"); *see also In re Olde Prairie Block Owners, LLC*, 448 B.R. 482, 492 (Bankr. N.D. Ill. 2011) (same). When applying the "business judgment" standard to a use of estate property under section 363 of the Bankruptcy Code, a trustee's judgment is "entitled to great judicial deference as long as a sound business reason is given." *See In re Efoora, Inc.*, 472 B.R. 481, 488 (Bankr. N.D. Ill. 2012).

14. Similarly, Bankruptcy Rule 9019(a) sets forth the requirements for compromises and settlements and permits a bankruptcy court to approve a trustee's "compromise or settlement" after notice and a hearing, if such settlement is "fair and equitable . . . and in the best

interests of the bankruptcy estate.” *Depoister v. Mary M. Holloway Found.*, 36 F.3d 582, 586 (7th Cir. 1994); *see also In re Energy Co-op., Inc.*, 886 F.2d 921, 927 (7th Cir. 1989) (“The benchmark for determining the propriety of a bankruptcy settlement is whether the settlement is in the best interests of the estate.”); *In re Smith*, No. 02-16450-JKC-7A, 2008 WL 4276171, at *2 (Bankr. S.D. Ind. Sept. 10, 2008) (same). Settlements should be approved unless “the settlement ‘falls below the lowest point in the range of reasonableness.’” *In re Commercial Loan Corp.*, 316 B.R. 690, 698 (Bankr. N.D. Ill. 2004) (quoting *Energy Co-op.*, 886 F.2d at 929); *In re Doctors Hosp. of Hyde Park, Inc.*, 474 F.3d 421, 426 (7th Cir. 2007); *see also In re Artra Grp., Inc.*, 300 B.R. 699, 702 (Bankr. N.D. Ill. 2003). Settlements and compromises are favored in bankruptcy because they expedite case administration and reduce unnecessary administrative costs. *Fogel v. Zell*, 221 F.3d 955, 960 (7th Cir. 2000). In determining whether a compromise is in the best interests of the estate, the Court must compare “the settlement’s terms with the litigation’s probable costs and probable benefits.” *In re Am. Reserve Corp.*, 841 F.2d 159, 161 (7th Cir. 1987); *see also Doctors Hosp.*, 474 F.3d at 426 (“Among the factors the court considers are the litigation’s probability of success, complexity, expense, inconvenience, and delay, including the possibility that disapproving the settlement will cause wasting of assets.”) (internal quotation marks and citations omitted); *Commercial Loan*, 316 B.R. at 697 (holding that relevant factors a bankruptcy court should consider in approving a settlement include “the litigation’s probability of success, its complexity, and its ‘attendant expense, inconvenience and delay’” (quoting *Am. Reserve Corp.*, 841 F.2d at 161)).

15. The settlement resolves complex potential litigation and avoids the significant expense associated with such litigation that would have a direct adverse impact on the value of the Affiliated Debtors’ bankruptcy estates. As such, the settlement minimizes the administrative

costs of the Affiliated Debtors' bankruptcy estates and preserves value for creditors. Based upon these considerations and the Trustee's business judgment, the Trustee respectfully submits that the Settlement Agreement is fair, equitable, in the best interest of the Affiliated Debtors' bankruptcy estates and within the range of reasonableness for approval under Bankruptcy Rule 9019(a).

VI. NOTICE

16. Pursuant to the *Notice, Case Management and Administrative Procedures* (the "Case Management Procedures") approved by the Court on October 4, 2016 [Doc 220], the Trustee will serve a copy of this motion on the following (as defined in the Case Management Procedures): (a) the Core Group; (b) the Request for Notice List; (c) the Appearance List; and (d) D&T.

NOTICE IS GIVEN, that pursuant to the Case Management Procedures, any objection to this motion must be in writing and filed with the Bankruptcy Clerk by no later than **4:00 p.m.** (prevailing Eastern Time) on **January 23, 2019**. Those not required or not permitted to file electronically must deliver any objection by U.S. mail, courier, overnight/express mail or in person at:

116 U.S. Courthouse
46 East Ohio Street
Indianapolis, IN 46204

The objecting party must also serve a copy of the written objection upon the Trustee's counsel, at Counsel for Trustee Deborah J. Caruso, Rubin & Levin, P.C., 135 N. Pennsylvania Street, Suite 1400, Indianapolis, IN 46204. **If an objection is NOT timely filed, the requested relief may be granted without a hearing.**

NOTICE IS FURTHER GIVEN that in the event an objection to this motion is timely filed, a hearing on this motion and such objection will be conducted on **January 30, 2019** at **1:30 p.m.** (prevailing Eastern time), in Room 325 of the United States Courthouse, 46 East Ohio Street, Indianapolis, IN 46204.

WHEREFORE, the Trustee respectfully requests entry of an order: (i) authorizing the Trustee, pursuant to the terms of the Settlement Agreement, to compromise and settle all claims

and causes of action related to D&T, including but not limited to, those claims and causes of action related to the D&T Claims; (ii) approving the Settlement Agreement; (iii) authorizing the Trustee to retain the Settlement Amount for general administration by the Affiliated Debtors' bankruptcy estates, and (iv) granting the Trustee all other just and proper relief.

Respectfully submitted,

RUBIN & LEVIN, P.C.

By: /s/ Meredith R. Theisen

Meredith R. Theisen

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2018, a copy of the foregoing *Trustee's Motion to Compromise and Settle All Claims Against Deloitte & Touche LLP* was filed electronically. Pursuant to Section IV.C.3(a) of the Case Management Procedures, notice of this filing will be sent to the following parties through the Court's Electronic Case Filing System. Parties may access this filing through the Court's system.

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I further certify that on December 20, 2018, pursuant to Section IV.C.3(c) of the Case Management Procedures, a copy of the foregoing *Trustee's Motion to Compromise and Settle All Claims Against Deloitte & Touche LLP* was emailed to the following:

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/s/ Meredith R. Theisen

Meredith R. Theisen

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